

The record before the Appeals Board is the same as that considered by the Administrative Law Judge and includes the transcripts of the Preliminary Hearings held

June 23, 1994, December 30, 1993, August 19, 1993, the discovery deposition of claimant taken August 4, 1993, and the exhibits and pleadings filed of record in this case.

ISSUES

The Preliminary Hearing of June 23, 1994, out of which this appeal arises was essentially a rehearing of the Preliminary Hearing held December 30, 1993. At that time the claimant was seeking medical treatment and specific diagnostic testing for his low back complaints which had been recommended by claimant's unauthorized medical expert. Respondent made a motion to terminate all medical treatment arguing that claimant had been rated and released for his injury to his mid-back and denying that claimant injured his low back as a result of the March 25, 1991, work-related accident. From the evidence presented at the December 30, 1993, Preliminary Hearing, Judge Foerschler found in his Order dated January 3, 1994, that there was insufficient evidence to find the low back injury compensable. Judge Foerschler in making this finding pointed in particular to the claimant's lack of low back complaints during the treatment he received following his injury.

At the June 23, 1994, Preliminary Hearing claimant introduced additional medical records not previously considered which tended to support claimant's contention that low back complaints were mentioned to the treating physicians and that those problems were addressed as a part of the authorized physical therapy treatment. Following this Hearing, the Administrative Law Judge entered his Order of July 6, 1994, which gave the parties the choice either to consider this matter as an application for a change of physician in which case the claimant would choose one of the three doctors suggested by the respondent or the court would appoint a neutral physician to examine claimant and determine if any further treatment is necessary. Included in his Order was the provision that if a neutral physician is ordered, the cost of that examination would be assessed against whichever party was found to be in error as to whether or not claimant needed further substantial treatment.

Claimant appeals that Order arguing that the Administrative Law Judge exceeded his jurisdiction in treating his Application for Preliminary Hearing as a request for a

change of treating physician such that the respondent was given the opportunity to name three physicians from whom claimant would have to choose one to be his authorized treating physician. Claimant contends that since respondent had not offered to provide medical treatment for claimant's low back prior to the Preliminary Hearing that the Administrative Law Judge should have ordered medical treatment be provided by a physician of claimant's own choosing. Secondly, claimant argues that the Administrative Law Judge exceeded his jurisdiction when he ordered in the alternative that should a neutral physician be ordered the cost would be imposed upon whichever party is found to be in error as to whether claimant needs further substantial treatment.

Respondent denies claimant has met his burden of proving his low back injury arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We must first address the issue of whether the Appeals Board has jurisdiction to review this appeal from a preliminary order. The disputed issues raised by claimant in this appeal do not involve any of the disputed issues set forth in K.S.A. 44-534a(a)(2). Therefore, it must be shown that the Administrative Law Judge has otherwise exceeded his jurisdiction in granting or denying the relief requested at the Preliminary Hearing for the Appeals Board to have jurisdiction to review this preliminary finding. See K.S.A. 44-551(b)(2)(A).

Claimant disputes the authority of the Administrative Law Judge to treat his request for medical treatment as an application for a change of treating physician under K.S.A. 44-510(c)(1). Claimant argues that since respondent never offered medical treatment subsequent to claimant's notice of intent letter informing respondent that claimant would seek a Preliminary Hearing in the event medical treatment was not afforded claimant for his low back injury, then the court should have ordered Dr. James Holleman as the authorized treating physician. We disagree. While designating claimant's choice for authorized treating physician may have been one option available to the Administrative Law Judge, he was certainly not obligated to do so. In declining to accept this option the Administrative Law Judge clearly did not exceed his jurisdiction. As respondent points out, at the time of claimant's notice of intent letter of March 23, 1994, and at the time of the June 23, 1994, Preliminary Hearing, the respondent was under no obligation to provide medical treatment. The Preliminary Order of January 3, 1994, entered by the Administrative Law Judge found that claimant's low back complaints were not compensable. Under these circumstances it would not have been

improper for the Administrative Law Judge to have simply permitted respondent to designate a physician to treat claimant's low back complaints. Instead, Judge Foerschler pointed to the evidence that the services of the authorized treating physician originally provided by respondent were unsatisfactory as a reason to allow, in the alternative, that the parties be given the choice of treating the matter as an application for change of physician such that the claimant would be able to choose one of the three qualified specialists named by the respondent to examine claimant and determine whether claimant was in need of further treatment. Judge Foerschler went on to give the parties as another option his naming a neutral physician pursuant to K.S.A. 44-516. Neither order exceeded the authority of an Administrative Law Judge to determine issues concerning the furnishing of medical treatment pursuant to K.S.A. 44-534 and K.S.A. 44-534a.

The question of whether the Administrative Law Judge has the authority to assess to the claimant the cost for a medical examination by a neutral physician pursuant to K.S.A. 44-516 is not before the Appeals Board as that option has not been exercised by the parties nor has such an order assessing costs been entered. Thus, that issue is not ripe for appeal.

We now turn to the issue raised by respondent at oral argument. Respondent admits claimant suffered a work-related injury to his mid-back but disputes his claim of injury to his low back. Respondent contends the Order for medical treatment or an IME

raises the jurisdictional issue enumerated in K.S.A. 44-534a of whether the injury arose out of and in the course of the employee's employment. The Appeals Board, having reviewed the testimony of the claimant, the medical records and reports in evidence and considering the record as a whole finds, under the facts of this case, that the issue raised by respondent is more properly categorized as what is the nature and extent of claimant's injury. This is not an issue over which the Board has jurisdiction on an appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this appeal should be, and is hereby, dismissed. The Preliminary Hearing Order of Administrative Law Judge Robert H. Foerschler, dated July 6, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c:

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Robert H. Foerschler, Administrative Law Judge
George Gomez, Director **ENDFIELD**